80-486

No. .....

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

CONSTANTINE "GUS" KARAS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Constantine "Gus" Karas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a county prosecutor's office is an "enterprise" within the scope of the RICO statute, 18 U.S.C. §§1961-1968, whether it has sufficient effect on interstate commerce under the statute, and even if so, whether a gambler who pays bribes to the sheriff and county prosecutor is thereby employed by or associated with the enterprise?

2. Whether a grant of immunity under 18 U.S.C. §§6002-6003 conferred by the government upon a defendant for his testimony on behalf of the government at the trial of a companion case is in effect for the purposes of testimony in his defense at his own subsequent trial?

3. When the government's evidence shows that the idea of the predicate crime, bribery, under the RICO indictment originated in the minds of the law enforcement officers and that defendant was not predisposed to commit the predicate crime, is entrapment established as a matter of law?

4. Whether the equal protection of the law is denied when the trial court fails to clearly charge the government must prove beyond a reasonable doubt that a defendant must be predisposed to commit the specific crime which is alleged to be the predicate offense of RICO?

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1. Constantine "Gus" Karas
2. Joseph N. Pecora
3. United States of America (Office of the United States Attorney, Northern District of West Virginia)

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OPINION BELOW

No opinion was rendered by the district court. The court of appeals' opinion and order dated July 1, 1980, affirming the district court's judgment of conviction, is reported in *United States v. Karas,* 624 F.2d 500 (4th Cir., 1980), and is also set forth herein at "Appendix A". The court of appeals' order, dated July 31, 1980, denying the petition for rehearing, is set forth herein at "Appendix B".

JURISDICTION

On July 1, 1980, the court of appeals issued its opinion and order affirming the district court's judgment of conviction. The court of appeals issued an order denying the petition for rehearing on July 31, 1980, and the within petition for a writ of certiorari is being filed within sixty (60) days of said order. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTES INVOLVED

UNITED STATES CODE, TITLE 18, §1961(4):

§1961. Definitions

As used in this chapter—

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

UNITED STATES CODE, TITLE 18, §1962(c):

§1962. Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged

in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

UNITED STATES CODE, TITLE 18, §6002:

§6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub.L. 91-452, Title II, §201(a), Oct. 15, 1970, 84 Stat. 927.

Statutes Involved.

UNITED STATES CODE, TITLE 18, §6003:

§6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91-452, Title II, §201(a), Oct. 15, 1970, 84 Stat. 927.

STATEMENT OF THE CASE

History

On February 6, 1979, petitioner Constantine "Gus" Karas, along with certain other named individuals, was indicted at criminal numbers 79-00003-E-06 and 79-00003-E-02 in the United States District Court for the Northern District of West Virginia. On April 5, 1979, a superseding indictment was returned. The indictment charged him in a single count (Count II) with a federal offense, to-wit: a violation of 18 U.S.C. §1962(d), the Racketeer Influenced and Corrupt Organizations Act ("RICO").

Specifically, the indictment alleged that from January 1, 1977 to January, 1979, in Hancock County, West Virginia, Karas and five other individuals conspired to commit an offense, to-wit: 18 U.S.C. §1962(c). Karas allegedly operated an illegal gambling business and gave three (3) monetary bribes to co-defendant Robert G. Altomare, Prosecuting Attorney of Hancock County, and to Ronald A. Donell, Sheriff of Hancock County, in order to protect, promote and facilitate said business.

After a severance of certain defendants was ordered, on May 21, 1979 a jury trial was convened involving Karas and two co-defendants. On May 25, 1979, the jury returned verdicts of guilty as to each of them. After post-trial motions were denied, Karas was sentenced to serve five (5) years of imprisonment and to pay a fine of $5,000.

The judgment of sentence was affirmed by the United States Court of Appeals for the Fourth Circuit on July 1, 1980. A petition for rehearing was denied on July 31, 1980. The within Petition For A Writ Of Certiorari follows.

Statement of the Case.

Facts

The government's evidence shows that Ronald Donell was the elected Sheriff of Hancock County, West Virginia, after January 1, 1977, and Robert G. Altomare was the county's Prosecuting Attorney whose duties are local in nature and defined by state statute.

Donnell had been aware of widespread gambling in the county for some time. He became involved in an undercover investigation which initially involved the state police and, beginning in November 1977, also involved federal law enforcement authorities. Physical observation, electronic surveillance and search and seizures were utilized.

On November 4, 1977, Ron's Cigar and the Corner Cigar, both Weirton, West Virginia gambling establishments, were raided by the Sheriff's Office. Before the raid, no Weirton gamblers had tried to bribe Donell, and he agreed "that those who conducted the gambling operations are not anxious to pay money if they don't have to" (Trial Transcript, "TT." 581-582). On January 13, 1978, Donell met with petitioner, Gus Karas, the operator of a gambling business at the North End Bus Terminal in Weirton, West Virginia, and told him to close down by the following Monday.

In October of 1978, the various Weirton gambling establishments were still operating. Altomare and Donell concocted a scheme whereby Karas and other operators were threatened, i.e., search warrants would be executed and their places of business would be closed down unless they made adequate payoffs to the Prosecutor and Sheriff. Karas then met with Donell, and subsequently made three (3) $1500.00 payments to him from November, 1978 to January, 1979.

Argument.

In his defense, Karas intended to testify. Prior thereto, he sought a ruling that a grant of immunity previously conferred upon him was still in effect. The government had granted him immunity to testify as their witness in a companion case. Although he never testified at that trial, there was a stipulation as to his testimony. The government argued the immunity was restricted to the earlier trial, and the court agreed, ruling the grant of immunity did not extend to the instant proceedings. As a result, Karas did not testify.

ARGUMENT

I.

The Court Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

On February 6, 1979, petitioner Karas was indicted in this matter as well as in a separate case alleging a violation of 18 U.S.C. §1955. On May 7, 1979, Karas was granted immunity to testify for the government in *United States v. Julian,* (Cr. No. 79-07, N.D. W.Va.), a companion case. In a letter authorizing the grant of immunity, Phillip B. Heymann, the Assistant Attorney General, wrote:

> ". . . I hereby approve your request for authority to apply to the U.S. District Court for the N. D. of W.Va. for an order pursuant to 18 U.S.C. §§6002-6003 requiring . . . Karas to give testimony . . . in [*U.S. v. Julian et al.*] and in *any further proceedings* resulting therefrom or *ancillary thereto.*" (emphasis supplied)

Although he never testified at that trial, there was a stipulation as to his testimony.

Before testifying at his own trial in late May, 1979, Karas sought a preliminary ruling that the grant of immunity was still in effect. The government argued that the grant was restricted to the *Julian* case. The trial court agreed that it was a "unique" situation and observed:

> "I can see where the selective application of the immunity statute, particularly in a setting such as we have here presented, could be very detrimental and prejudicial and you get into the matter of the privilege against self-incrimination and so forth. As I gather here, the defendant is subject to a later prosecution under another indictment in this court which flow from this same series of eight or nine indictments which I talked about before. And that the taking of him of the witness stand in this case can or might put him in a compromising position with regard to an effective defense of the charges in the subsequent proceedings." (TT. 641)

Nevertheless, the trial court ruled the grant of immunity did not extend to the instant proceedings. As a result, Karas did not testify (TT. 630-642). The court of appeals then affirmed this ruling.

Karas argues that the grant of immunity previously conferred upon him by the government for his testimony in a companion case was still in effect for the purposes of his own trial. The panel of the court of appeals seems to misconstrue this argument, because Karas is *not* raising a question of whether or not a district court has authority to confer immunity *sua sponte* or whether

or not a district court can extend the earlier grant of immunity to the instant proceedings (see Opinion, pp. 7a-9a of Appendix hereto). Here, the issue concerns the extent of the original grant by the government, without any involvement on the part of a district court. Quaere: what are its parameters? By what statute, policy or language of the grant itself is it limited to a single court proceeding?

In the case at bar, these questions remained unanswered. The ruling below effectively determined that the same use immunity which applied to Karas in a companion case, when he was a government witness and offered to present incriminatory evidence, was not applicable to the instant case where he is a defendant and wishes to present exculpatory evidence. While approving of this ruling, the panel of the court of appeals does not address the real question involved. It is a complex and unique question, one deserving of a thorough examination. It is respectfully submitted that this Court should be most concerned with the effects of an immunity grant, in terms of the government's authority to selectively draw the borders of its coverage and how this can conflict with the constitutional right of an accused to present a defense. The circumstances here are unusual, and no case law on point has been found by these writers.

It is submitted, however, that *In Re Patrick,* 385 F.Supp. 189 (N.D. Ill. E.D., 1974), is analogous. On January 31, 1974, Patrick was granted immunity for testimony to be given before the January 1974 grand jury. Prior to the grant of immunity, the government submitted to the court a letter from its Assistant Attorney General. The letter, like the one submitted in the

Julian trial, authorized the United States Attorney to seek an immunity order requiring Patrick to testify "in the above matter and in any further proceedings resulting therefrom or ancillary thereto." Patrick testified, the January grand jury was discharged, and a new grand jury, a special November 1974 grand jury, was formed. The investigation of the November grand jury "result[ed] from and [was] ancillary to the investigation previously conducted by the . . . January grand jury." The district court held that the earlier grant of immunity covered Patrick's testimony before the November grand jury:

> "The function of the authorization letter is to insure that immunity orders are obtained only in situations where the testimony of the witness is necessary to the public interest. 18 U.S.C. §6003(b)(1). Once the Attorney General has made that determination, it is immaterial whether the information sought from the witness is presented to one or several grand juries. The witness asserts that if the Government's position is accepted he would be susceptible to recall before any grand jury for an indefinite time. However, the Attorney General's certification that the testimony sought is, in fact, necessary is only valid so long as the focus of the inquiry remains the same. If the United States Attorney seeks testimony not related to the matter which gave rise to the original grant of immunity, a second authorization letter would have to be obtained." 385 F.Supp. at 190.

Here, Karas was granted immunity because the Government regarded his testimony as necessary to the public interest. It should be immaterial when it is presented as

long as the proceeding is at least "ancillary" to that in which the immunity was received. It is Karas' position that his own trial was an "ancillary" proceeding, and thus the immunity was still in effect.

It is commonly held that the decision to grant immunity is within the sole discretion of the prosecutor. *In Re Kilgo,* 484 F.2d 1215 (4th Cir., 1973); *Thompson v. Garrison,* 516 F.2d 986 (4th Cir., 1975); *United States v. Bautista,* 509 F.2d 675 (9th Cir., 1975). In exercising this discretion, the government determined that Karas' testimony was in the public interest. 18 U.S.C. §§6002-6003. Having made this determination, and having exhausted its supply of discretion in deciding to grant immunity, the government in the court below sought to suppress Karas' testimony solely, it seems, because it would tend to establish his innocence. If the testimony is in the public interest, it is in the public interest whether it inculpates the defendant in *Julian* or exculpates Karas.

The government has already decided that it is willing to accept the effects of that grant on their ability to prosecute Karas on the gambling indictment. In fact, Karas had already been indicted for violating the federal gambling statute when immunity was granted to him. The government therefore had no interest at the time of the instant trial which overcomes Karas' right to present a defense, *Washington v. Texas,* 388 U.S. 14 (1967), nor does it have the power to suppress evidence because it might be exculpatory. *Brady v. Maryland,* 373 U.S. 83 (1963).

Finally, the danger of selective use of the immunity statute has attracted the attention and concern of an increasing number of courts. *Shaffer v. United States,*

528 F.2d 920, 922 (4th Cir., 1975); *United States v. Earl,* 361 F.2d 531, 534 n.1 (D.C. 1966); *United States v. Alessio,* 528 F.2d 1079 (9th Cir., 1976); *Government of the Virgin Islands v. Smith,* 615 F.2d 964 (3rd Cir., 1980). Assuming the government has the power to deny Karas the immunity it already granted him, this denial clearly deprives him of his right to present a defense. Also, it is clearly distinguishable from *Earl* where the court found no *Brady* violation because the refusal to grant immunity was not an "affirmative" act.

II.

The Decision Below Conflicts With the Decision of Another Court of Appeals as to the Meaning of the Term "Enterprise" Under the RICO Statute (18 U.S.C. §1961 et seq.).

The Racketeer Influenced Corrupt Organization (RICO) statute, 18 U.S.C. §§1961-1968, proscribes the operation of "any enterprise" by a pattern of racketeering activities. Section 1961(4) defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

The only enterprise with which Karas was allegedly associated was the Office of the Prosecuting Attorney of Hancock County, West Virginia. In the lower courts, Karas argued that this Office is not an enterprise within the meaning of the statute, and it does not have sufficient effect on interstate commerce. The court of appeals rejected these arguments (see Opinion, p. 6a of the Appendix hereto). Karas contends that this decision by the court below as to the interpretation of the

term "enterprise" conflicts with the decision of another court of appeals.

In *United States v. Anderson,* Nos. 79-1809, 79-1827 (8th Cir. August 7, 1980), 27 Cr.L. 2518, the Eighth Circuit recognized it differed with the Second, Fifth, Seventh and Ninth Circuits and agreed only with the Sixth, by holding that the "enterprise" element of RICO requires proof of a "discrete economic association existing separately from the racketeering activity" (slip opinion, p. 30). The court said:

> "We hold that Congress intended that the phrase 'a group of individuals associated in fact although not a legal entity,' as used in its definition of the term 'enterprise' in section 1961(4), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic goal* that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity'." (emphasis supplied)

The Eighth Circuit thus believes the essence of the entity must be economic. This view differs markedly from the Fourth Circuit's interpretation in the instant matter.

The Office of the Prosecuting Attorney is a creation of state statute. The duties of a county prosecutor are set out in West Virginia Code Ann., Chapter 7, Article 4, Section 1 (Michie 1976 Replacement Volume). These duties include the enforcement of the criminal laws of the State of West Virginia, the defense and prosecution of all civil suits in which the State of West Virginia,

the county or the Board of Education is a party, as well as assistance to the Attorney General of the State of West Virginia in the county in which the prosecutor serves. As can be easily discerned, all authority and activity of the prosecutor is strictly local in nature and non-economic. Therefore, any crimes involving the acts of a public official (employed by the Office of the Prosecuting Attorney) in conducting the affairs of that office are necessarily local in nature and non-economic. Consequently, their actions do not, and were not meant to, come within the ambit of Organized Crime Control Act.

Karas maintains that applying the Eighth Circuit's reasoning to the case at hand results in a finding that the Office of the Prosecuting Attorney is not, and cannot be, a "discrete economic association", and therefore it is not an "enterprise" under RICO.

It is also noted that the express language of 18 U.S.C. §1962(c) requires that the government prove the named enterprise be one engaged in, or the activities of which affect, interstate commerce. *United States v. Vignola,* 464 F.Supp. 1091 (E.D. Pa. 1979). Since the Office of the Prosecuting Attorney is not engaged in interstate commerce, the only possible basis for finding this enterprise to be within the statute would be to prove that its activities affect interstate commerce.

The court below charged:

> "The government is required to show beyond a reasonable doubt that the enterprise is engaged in or affects interstate commerce. Interstate commerce means commerce between the several states. The government is not required to show any particular degree or affect on interstate commerce . . ." (TT. 686)

Argument.

The government attempted to prove the requisite interstate nexus by introducing evidence of: interstate phone calls, purchase of office equipment and supplies out-of-state, presence of out-of-state litigants and parties in law suits, existence of law enforcement investigations concerning out-of-state persons and use of national communications data systems of the National Crimes Information Center. It is contended that such evidence is inadequate to establish the jurisdictional element of the statute. See: TT. 486 et seq.

The only matter which could reasonably be viewed as affecting *interstate commerce* would be the purchase of office supplies and equipment. There was no showing made that these purchases were in any way affected by the matters at bar. Moreover, the Prosecuting Attorney's Office does not have the power, or the authority, to purchase equipment or supplies; this must be done by the County Commission which is a separate, distinct entity. See: West Virginia Code Ann. Chapter 7, Article 1, Section 5 (Michie 1976 Replacement Volume).

The activities of the Prosecuting Attorney's Office may sometimes necessitate contact with other states, but by no stretch of the imagination may this contact be considered to exert a substantial effect on interstate commerce. Naturally the office may purchase supplies which at some point move across state lines. If this is a valid basis for jurisdiction, then the activities of every household in America could be seen as affecting interstate commerce, and they also would come within the reach of RICO.

Also, it was stipulated that none of the monies collected by Altomare and/or Donell in connection with bribery, gambling, etc. was deposited in the County

Commission funds (TT. 491-492). Thus, no link exists between the payoff monies and the expenditure of same by or on behalf of the Prosecuting Attorney's Office in interstate or other commerce.

Finally, it is significant that there is no evidence that Karas undertook any activity on behalf of or relating to an enterprise organized and acting for some ostensibly legal purpose. At best, the evidence demonstrates individuals undertaking activity relating to illegal gambling. If any enterprise has been proven, it would be that of the illegal gambling operations. Since such an enterprise is neither organized nor acting for a legitimate purpose, it was not meant to come within the reach of the RICO statute.

Therefore, the government has failed to prove that Karas was employed by or associated with an "enterprise" within the meaning of 18 U.S.C. §1961(5).

III.

The Decision Below Conflicts With the Applicable Decisions of This Court on the Law of Entrapment.

A.

It was argued that the instructions to the jury on entrapment (TT. 686-687) were fatally vague; they should have made clear that the government was required to show Karas was already predisposed to commit acts of *bribery,* the predicate offenses underlying the RICO violation.

The panel initially misconstrued this argument by stating that Karas believed the government had to show predisposition to commit "the acts of bribery *and gam-*

bling" (Opinion, p. 2a of Appendix hereto; emphasis supplied). The distinction is crucial; evidence of Karas' gambling was irrelevant and prejudicial to whether or not he committed acts of bribery, *the* underlying predicate offense. Quite simply, under the lower court's instructions and the views of the circuit court panel, Karas can be considered a briber solely because he is a gambler.

The panel went on to say the lower court instructed the jurors to

> "apply the law of entrapment to the charge in the indictment, which was conspiracy to violate the RICO Act, *not violations of bribery and gambling statutes.*" (Opinion, p. 3a of Appendix hereto; emphasis supplied).

The RICO Act proscribes a conspiracy "to violate any of the provisions of subsections (a), (b), or (c)" of 18 U.S.C. §1962; the instant indictment alleges a conspiracy "to commit an offense against the United States, to wit: Title 18, U.S.C. §1962(c)". Section 1962(c) provides:

> "(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Here, the "racketeering activity" was alleged to be the payment of bribes. Thus, to say the charge in the indictment was "conspiracy to violate the RICO Act" is not enough; such a barebones charge is meaningless until

some flesh is added to explain how, or by what act(s), RICO is violated. Here, allegations (and proof) of acts of bribery provide that flesh.

Later, in its opinion, the circuit court panel decides that the admission into evidence of monies seized from gambling estalishments was relevant to show the source of the bribe payments (Opinion, p. 7a of Appendix hereto). It is argued that such a view is contradictory to the reasoning in regard to the entrapment instruction issue, and in fact, is supportive of Karas' position on said issue. In other words, it appears the panel recognized the interrelationship between the allegation of conspiracy and bribery under the instant indictment: without the acts of bribery being shown, the specific, alleged conspiracy to violate RICO cannot be proven.

The same is true when the panel condoned the admission of the taped conversation (concerning Karas making payoffs to police) "to show Karas' predisposition to commit the charged offense in view of the defense of entrapment" (Opinion, pp. 6a-7a of Appendix hereto). If the tape (and the monies) are relevant to the prosecution's case for this reason, *quaere:* why isn't it critical to precisely instruct the jury on Karas' predisposition to commit acts of bribery?

In general, predisposition to conspire to violate RICO says little; but under the statute and this specific indictment, it is wholly inadequate.

In *United States v. Burkley,* 591 F.2d 903, 910 (D.C. Cir., 1978, Judge McGowan wrote:

> "In each [of the Supreme Court's rulings on entrapment], the Court has consistently explained that the ultimate fact to be determined by the jury is

> whether the defendant has 'predisposed' to commit *the crime with which he is charged.*" (emphasis supplied)

And, from *United States v. Wolffs,* 594 F.2d 77, 83 (5th Cir., 1979):

> "The instruction also must be *unmistakably clear* in informing the jury that if the evidence in the case leaves a reasonable doubt as to whether defendant had the predisposition to commit *an offense of the character charged,* apart from the government inducement or persuasion, the defendant must be found not guilty." (emphasis supplied)

Under the subjective test for entrapment which emphasizes the predisposition of the defendant rather than the methods employed by the police, the prosecution may engage in a " 'searching inquiry into [the defendant's] own conduct and predisposition' as bearing on his claim of innocence." *Sherman v. United States,* 356 U.S. 369, 373 (1958); *Sorrells v. United States,* 287 U.S. 435, 451 (1932). When the defendant has a prior criminal record or, as here, where he was involved in an illegal activity different from that for which he is charged, this searching inquiry can be more harmful than helpful, by allowing the introduction of prejudicial or irrelevant evidence. Assuming that the evidence of Karas' gambling was introduced to establish his predisposition to bribe, it should have been excluded as irrelevant, Federal Rule of Evidence 401, and/or prejudicial, Federal Rule of Evidence 403. Assuming that this evidence was admitted to establish the scenario in which the bribe was made, the prejudice still exists, but the evidence is now necessary to help the jury to understand the case. To minimize the prejudice and to insure that the sub-

jective test is applied fairly, it is imperative that the jury be carefully and properly instructed. When, as here, it is told that the government need only prove that the defendant was *predisposed to violate the law,* the charge distorts the subjective test so that it does not follow *Sorrells, Sherman* and *United States v. Russell,* 411 U.S. 423 (1973), and its application in this distorted form denies Karas the equal protection of the law under the Fourteenth Amendment to the United States Constitution. The trial court's charge effectively precludes a defendant who, like Karas, is engaged in an unrelated illegal activity from raising the entrapment defense. Simply put, the charge makes the gambler a briber because he is a gambler.

B.

The entrapment defense serves to protect the citizen from conviction,

> "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States, supra,* 287 U.S. at 442.

Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials. *Sherman v. United States, supra,* 356 U.S. at 372; *Sorrells v. United States, supra,* 287 U.S. at 441.

In this case, the undisputed testimony of the government's witnesses shows that Gus Karas was entrapped as a matter of law. First, the bribery scheme originated in the minds of law enforcement officials—

District Attorney Altomare and Sheriff Donell of Hancock County. Their plan was to threaten to raid Karas' gambling establishment unless he paid Donell and Altomare. Based on information obtained by the joint F.B.I.-West Virginia State Police investigation, and the Hancock County Sheriff's Office, affidavits were sworn and warrants had been issued at the time Karas was told to make these payments. Altomare told Donell to hold the warrants over Karas' head.

In *United States v. Russell, supra,* this Court made it clear that the purpose of the entrapment defense is not to control police practices but to prevent the conviction of innocent persons. Primary emphasis, then, is placed on the defendant's predisposition to commit the offense charged; once the defendant raises the issue of entrapment by "go[ing] forward with some evidence, more than a scintilla, that [the government or its] agents induced him to commit the offense," *United States v. Perl,* 584 F.2d 1316, 1321 (4th Cir., 1978), the focus shifts entirely to predisposition to commit the crime charged. *United States v. Viviano,* 437 F.2d 295, 299 (2d Cir.), cert.den. 402 U.S. 983 (1971), describes three ways to prove predisposition:

> "[T]he Government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement."

See also: *United States v. Anglada,* 524 F.2d 296, 299 (2d Cir., 1975). With regard to the first two criteria,

Sheriff Donell's undisputed testimony is that before November 1978, before Karas was threatened with the raids, he and none of the other gamblers were "anxious to pay money if they d[id]n't have to" (TT. 581-582). Nor, testified Donell, had any gamblers (other than a Mr. Pinciaro) attempted to bribe him. Also, there is no evidence that Karas had ever paid bribes or been the victim of extortion before this time. The defense of entrapment deals with how the crime "originates". *Sorrells v. United States, supra.* There is no ironclad rule that reluctance indicating a lack of propensity must continue throughout the transaction. *United States v. Anglada, supra,* 524 F.2nd at 299. In *United States v. Wolffs, supra,* 594 F.2d at 83, the court of appeals held:

> "[T]he burden is upon the government to prove beyond a reasonable doubt that, *before anything at all occurred respecting the alleged offense for which the defendant is being prosecuted,* the defendant was ready and willing to commit such crimes whenever an opportunity was afforded, and that the government agents did no more than offer the opportunity." (emphasis supplied)

Karas' statements to Donell after the raid was threatened may be evidence of knowledge or intent but do not support the position that Karas was predisposed or willing to pay the bribe. Thus the government must prove Karas' ready response to the inducement to commit bribery. The evidence is plain that Karas was threatened with search and arrest unless he paid. This is not bribery, it's extortion. Nor is it like the narcotics transaction, where the suspected drug dealer loses nothing by refusing to make the sale. Although the subjective test focuses on the defendant's predisposition, the response

to the government's inducement must be considered in the context of the nature of that inducement. The drug addict in *Sherman* would have been unwilling to sell heroin if he had not been a drug addict. In view of his situation and the form of the government's inducement, he had no power to refuse. Here, Karas had no choice but to pay Donell.

Since the evidence shows that the idea of the predicate crime, bribery, originated in the minds of the law enforcement officers and that petitioner Karas was not predisposed to commit the predicate crime, entrapment is established as a matter of law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,
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September, 1980

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-5311

UNITED STATES OF AMERICA, Appellee,

v.

CONSTANTINE "GUS" KARAS, Appellant.

No. 79-5320

UNITED STATES OF AMERICA, Appellee,

v.

JOSEPH NICOLAS PECORA, Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, Chief District Judge.

Argued: May 5, 1980 Decided: July 1, 1980

Before RUSSELL, Circuit Judge; FIELD, Senior Circuit Judge; and HALL, Circuit Judge.

John L. Doherty (Manifesto, Doherty, Love and Talarico on brief) for Appellant Pecora; Thomas A. Livingston (Dennis J. Clark, Livingston, Miller, O'Malley & Clark on brief) for Appellant Karas; William A. Kolibash, Assistant United States Attorney (Stephen G. Jory, United States Attorney on brief) for Appellee.

Appendix A.

HALL, Circuit Judge:

Constantine "Gus" Karas and Joseph N. Pecora appeal from their respective convictions of violating the Racketeer Influenced and Corrupt Organizations Act [RICO Act], 18 U.S.C. §1962(d). Both men were charged with participating in a conspiracy to bribe county law enforcement officials in order to conduct illegal gambling activities. The government's evidence, gathered over a two-year period by state and federal officials, consisted primarily of the sheriff's testimony and numerous taped conversations between the sheriff and various members of the conspiracy, including Karas and Pecora. After a five-day trial, the jury returned guilty verdicts against both men. After the district court denied their post-trial motions, Karas and Pecora noted several assignments of error. Finding no error, we affirm the convictions.

I. JOINT ASSIGNMENTS OF ERROR

Both Karas and Pecora allege that the district court committed error by: (1) giving an improper jury charge on the issue of entrapment; (2) giving an incorrect jury charge pertaining to the conspiracy element of §1962(d); (3) failing to grant the motion to sever their trials; and (4) failing to rule that the evidence was insufficient to sustain the verdicts. Appellants argue that a proper entrapment instruction would require the government to show that both men were already pre-disposed to commit the acts of bribery and gambling underlying the RICO Act violation. Counsel contends that no such predisposition was established at trial[1] and that the entrapment

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1. Karas asserts that he was entitled to a defense of entrapment as a matter of law. In view of the factual dispute regarding this issue, the trial court properly submitted it to the jury for resolution.

instruction given was overly broad and fatally vague. When read in its entirety,[2] the charge clearly informed the jury to apply the law of entrapment to the charge in the indictment, which was conspiracy to violate the RICO Act, not violations of bribery and gambling statutes. Appellants' contention to the contrary is without merit.

Karas and Pecora also challenge the propriety of the conspiracy instruction. Their main objection is that the trial judge erroneously charged the jury as to a conspiracy under 18 U.S.C. §371, which requires only one overt act, rather than §1962(d), which requires two racketeering activities. *United States v. Elliott,* 571 F.2d 880 (5th Cir. 1977), and *United States v.Campanale,* 518 F.2d 352 (9th Cir. 1975), mandate at least two predicate offenses to establish a conspiracy under §1962(d). The district court did give a general conspiracy charge, similar to that under §371, requiring only one overt act. How-

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2. The trial court instructed the jury as follows:

> If, then, the jury should find beyond a reasonable doubt from the evidence in this case, that before anything at all occurred respecting the alleged offense involved in this case, the defendants were ready and willing to commit the *crime charged in the indictment,* whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendants are not victims of entrapment.
>
> On the other hand, if the evidence indicates and should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit *any offense of the character here charged,* and did so only because they were induced or persuaded by some officer or agent of the government, then it is your duty to acquit them. (Emphasis supplied)

ever, the trial judge further instructed the jury that the appellants could not be convicted under §1962(d) unless the purpose of the conspiracy was to violate the RICO Act and that at least two racketeering acts had occurred.[3] Viewing the overall conspiracy charge, there is no reason to believe that the jury was misled regarding the requirement of at least two predicate offenses to find a violation under §1962(d).

Appellants next argue that the district court abused its discretion by failing to grant a severance of their trials. They allege substantial prejudice by the refusal of the trial court to grant any of the motions for severance under Rule 14 of the Federal Rules of Criminal Procedure. Appellants urge that their joint trial improperly allowed the jury to consider evidence inculpatory to one defendant as pertaining to both of the accused.

Both Karas and Pecora were indicted together[4] based upon their interrelated illegal activities. Absent a

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3. The specific instructions provide, in part, that:

> The defendant, or any of them, may not be convicted simply because they engaged in a conspiracy. The prosecution must show beyond a reasonable doubt that the predominate purpose of the conspiracy was to violate Title 18, United States Code, Section 1962(c)....
>
> * * *
>
> Third: that at least two acts of racketeering activity occurred... and that the acts were connected with each other by some common scheme, plan, or motive....
>
> Fourth: that through the proposed commission of two or more connected acts the defendants would conduct or participate in the conduct of the enterprise.

4. The federal grand jury indicted several persons for violating the RICO statute in connection with the alleged bribery and gambling activities in Hancock

prejudicial effect, persons indicted together may generally be tried together. *United States v. Shuford,* 454 F.2d 772 (4th Cir. 1971). The appellants have failed to show that the denial of their motions for severance deprived them of a fair trial. *United States v. Mandel,* 415 F. Supp. 1033 (D. Md. 1976), *vacated on other grounds,* 591 F.2d 1347 (4th Cir. 1979), *conviction aff'd en banc* 602 F.2d 653 (4th Cir. 1979). Rather, the district court's instructions were calculated to ensure that the jury considered the evidence only as to the defendant against whom it was admitted. We do not think that the trial court abused its discretion in denying the motions for severance. *See, United States v. Dorsett,* 544 F.2d 687 (4th Cir. 1976).

The last joint assignment of error challenges the sufficiency of the evidence underlying the convictions. Pecora contends that the evidence failed to show that he engaged in a pattern of racketeering activity; i.e., commission of at least two of the acts outlined in §1961(5). He admits to making only one bribe and argues that two other bribes, allegedly made by other defendants in his behalf, would at the most only constitute installments of one overall bribe. We follow the reasoning of other federal courts in rejecting this installment approach to bribery cases. *E.g., United States v. Anderson,* 509 F.2d 312 (2d Cir. 1974); *United States v. Alaimo,* 297 F.2d 604 (3rd Cir. 1961).

County, West Virginia. Before trial, the trials of the remaining defendants were severed from that of Karas and Pecora due to the anticipated complexity of the testimony and to minimize any possible prejudicial effect which inculpatory evidence admitted against one defendant may have had upon the remaining co-defendants.

Karas and Pecora also urge that the RICO statute is not applicable to the allegedly illegal activities because there was no "enterprise" or impact on interstate commerce regarding the bribery and misuse of the offices of the county law enforcement officials. We have already rejected similar arguments regarding the scope of the RICO statute in *United States v. Whitehead,* No. 78-5160 (4th Cir. Mar. 20, 1980), and *United States v. Altomare,* No. 79-5146 (4th Cir. June 17, 1980).[5]

II. Karas' Assignments of Error

In addition to the above issues, appellant Karas raises two others: (1) whether the trial court erred by admitting evidence of other illegal activity, as well as evidence regarding monies seized from unindicted persons; and (2) whether the court should have allowed Karas to testify under a grant of immunity given in a previous case.

Karas contends that the playing of a taped conversation in which he admitted to bribing local police officers was irrelevant to the charged offense and was so prejudicial as to outweigh its probative value. We believe the trial court balanced the possible prejudicial effect against the relevancy of the evidence and properly ad-

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5. *United States v. Altomare* was a companion case in which this Court specifically held that: (1) the office of the prosecuting attorney was an "enterprise" under the statute, and (2) that there was a sufficient nexus with interstate commerce to come within the purview of the RICO Act. *See also United States v. Baker,* No. 79-5167/68/69 (4th Cir. Mar. 17, 1980) (county sheriff's office is an enterprise under RICO); *United States v. Grzywacz,* 603 F.2d 682 (7th Cir. 1979), and *United States v. Brown,* 555 F.2d 407 (5th Cir. 1977) (city police departments were enterprises under RICO).

mitted it to show Karas' predisposition to commit the charged offense in view of the defense of entrapment. Such a decision is in accord with *United States v. Russell,* 411 U.S. 423 (1973); *Sherman v. United States,* 356 U.S. 369 (1958); and *United States v. Koska,* 443 F.2d 1167 (2d Cir.), *cert. den.,* 404 U.S. 852 (1971). Moreover, this evidence would also be properly admitted for the purpose of showing a furtherance of the challenged conspiracy under Rule 801(d)(2)(E), Federal Rules of Criminal Procedure.

Karas also challenges the admission of monies seized by federal agents in January 1979 from the business premises of Karas and four other alleged co-conspirators. He claims the evidence is irrelevant because some monies were seized from unindicted persons and because there was no connection shown between the monies and the alleged gambling and bribery activities. Counsel claims that the jury's reaction to the large amounts of cash would adversely affect their ability to impartially evaluate such evidence and is therefore prejudicial.

The monies in question were seized from the establishments in which gambling had been observed and whose owners were purportedly members of the conspiracy to which Karas belonged. The trial judge admitted this evidence to show the source of the monthly $1500 bribe to county law enforcement officials. We do not believe that the seized monies were either so unrelated to the alleged conspiracy or so prejudicial to the appellant as to outweigh their obvious relevancy to the issues at trial.

Karas' final argument presents a somewhat novel approach concerning the breadth of a grant of immunity.

Karas had been granted immunity by the government to testify at a previous trial of one of the co-conspirators. Although he never testified at the trial, there was a stipulation as to his testimony. Before testifying at his own trial, Karas sought a preliminary ruling that the grant of immunity was still in effect. The government argued that the grant of immunity was restricted to the earlier case and only precluded questioning Karas about this prior stipulated testimony. During oral argument to this Court, Karas' counsel stated that he sought the preliminary ruling in order to prevent Karas' testimony from being used in subsequent criminal proceedings. Counsel contends that the denial of immunity in the present proceeding impairs Karas' right to present a defense as in *Washington v. Texas,* 388 U.S. 14 (1967).

The decision to grant immunity is within the sole discretion of the prosecution. *Thompson v. Garrison,* 516 F.2d 986 (4th Cir. 1975); *In re Kilgo,* 484 F.2d 1215 (4th Cir. 1973). Thus, the district court has no authority to confer immunity *sua sponte. United States v. Klauber,* 611 F.2d 512 (4th Cir. 1979); *In re Kilgo, supra.* Since immunity is granted as a substitute for a person's Fifth Amendment rights, the refusal to grant immunity permits the defendant to exercise his usual rights under the Constitution. Every defendant must decide whether or not to testify. Karas cannot extend his Fifth Amendment rights, via an earlier grant of immunity as a witness, to protect his testimony as a defendant in subsequent judicial proceedings *ad infinitum.*

Karas' reliance on *Washington v. Texas* is misplaced. In *Washington,* a state statute allowed a co-defendant to testify for the prosecution but not for the defendant. This case does not deal with the issue of

testimony being made unavailable since it was Karas' choice not to take the stand. The district court correctly recognized that the defendant had no right to a grant of immunity and properly refused to extend the earlier grant to the present proceedings.

III. Pecora's Assignments of Error.

Appellant Pecora also alleges two other grounds as error: (1) that the government's closing argument was improper and prejudicial; and (2) that he was prejudiced by the trial court's refusal to excise part of the indictment.

During the trial, the district judge had ruled that certain evidence alleging Pecora's involvement with slot machines was inadmissible. In his closing argument, defense counsel reminded the jury that the government had promised, in its opening statement, to prove that Pecora had slot machines, but instead no such evidence had been put before the jury regarding this allegation. In rebuttal, the Assistant United States Attorney stated that the trial court had prevented the government from presenting any evidence of the slot machines, but that in any event such evidence was not needed for a conviction because other testimony established three acts of bribery by Pecora. Shortly after this rebuttal, defense counsel moved for a mistrial. The trial judge denied the motion and indicated he would cure any problem of prejudice

by giving appropriate instruction during his charge to the jury, which he later did.[6]

Pecora argues that the remarks made during rebuttal were not harmless under the test in *United States v. Leon,* 534 F.2d 667 (6th Cir. 1976), and deprived him of a fair trial. After evaluating the prosecution's statements in light of the four-prong test in *Leon,* we do not believe that Pecora was denied his due process right to a fundamentally fair trial. Although the remarks of the government attorney are not condoned by this Court, they clearly do not rise to the level of egregious misconduct which was condemned in such cases as *Miller v. Pate,* 386 U.S. 1 (1967), and *Brady v. Maryland,* 373 U.S. 83 (1963). Considering the trial judge's charge to the jury regarding what evidence it should or should not consider, such trial error, if any existed, would be harmless under the rationale of *Donelly v. DeChristoforo,* 416 U.S. 637 (1974).

Pecora also asserts that he was prejudiced by the trial court's refusal to excise the allegation in the in-

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6. Some of the cautionary instructions given by the trial court are as follows:

> The evidence in the case consists of the sworn testimony of the witnesses . . . and all exhibits received in evidence. . . .
>
> * * *
>
> The statements and arguments of counsel are, of course, not evidence in the case, unless made as an admission or stipulation of fact.
>
> * * *
>
> Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded, or considered only for the limited purposes for which the evidence was admitted.

dictment that he was engaged in business of an unknown nature in addition to his vending machine company.[7] The purpose for requesting this deletion was to counter any possible influence on the jury by media allegations that Pecora had ties with organized crime.

The government contends that the evidence presented to the grand jury of Pecora's gambling activities supported the allegations in the indictment. In addition, the extensive and painstaking jury selection proceedings ensured that only jurors who were unaffected by any media coverage were actually seated. We agree with the government's contentions and uphold the refusal of the trial court to delete this part of the indictment.

IV. Conclusion

Based on consideration of the issues raised by Karas and Pecora, we find the assignments of error to be without merit and affirm their convictions. The judgment of the district court is AFFIRMED.

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7. The challenged portion of the indictment relating to Pecora read as follows:

> Joseph Nicholas Pecora resided in Hancock County, West Virginia, was an owner/operator of J & Z Vending, *and was engaged in other business unknown to the Grand Jury.*

Defense counsel sought deletion of the above underlined portion of the indictment.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-5311

UNITED STATES OF AMERICA, Appellee,

versus

CONSTANTINE "GUS" KARAS, Appellant.

ORDER

Filed: July 31, 1980

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Russell, Judge Field, and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk